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No. 93-817

In The

Supreme Court of the United States

October Term, 1993

THE BOEING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA
ex rel. Kevin G. Kelly,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE BLUE CROSS AND BLUE SHIELD ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Dated: January 14, 1994

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Pursuant to Rule 37.2 of the rules of this Court, the Blue Cross and Blue Shield Association (the "Association" or "BCBSA") respectfully moves for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari. Petitioners have consented to the filing of this brief. This motion is made necessary by the refusal of respondent's counsel to provide consent.

BCBSA is a not-for-profit corporation organized under the laws of Illinois with its principal place of

business in Chicago. BCBSA functions as owner and licensor of the Blue Cross and Blue Shield service marks, monitors compliance with licensing agreements, and provides a variety of support services to its Member Plans. These services include representing the interests of its Member Blue Cross and Blue Shield ("BCBS") Plans before Congress and in the courts, providing Member Plans with research, actuarial, marketing, and other services, and coordinating public education and professional relations programs.

The Member Plans of BCBSA are 69 separate and autonomous not-for-profit health insurance companies located throughout the United States. The Plans are licensed to use the registered Blue Cross and Blue Shield service marks in designated service areas, many of which are statewide. BCBS Member Plans issue health benefit policies to individuals as well as groups. BCBS Plans enter into a variety of insurance and administrative-service contracts with employers and employer group health plans that provide a range of prepaid health care benefits. BCBS Plans provide or administer private health care benefits covering millions of Americans.

The Association also contracts with the Health Care Financing Administration ("HCFA"), an agency of the Department of Health and Human Services, to act as an administrator of Part A of Medicare, with 40 BCBS Plans as its subcontractors. Twenty-three BCBS Plans contract directly with HCFA as administrators of Part B of the Medicare program. Pursuant to these contracts, the BCBS Plans act as fiscal intermediaries and carriers between hospitals, physicians, and other providers and the HCFA,

and, as such, process Medicare claims for the Government.

BCBSA and its Member Plans have a strong interest in the outcome of this case. BCBS Member Plans have been sued in a number of *qui tam* actions to date. BCBS Plans have found themselves as *qui tam* defendants in one of at least two ways. *First*, as government contractors under the Medicare program, BCBS Plans have been sued for allegedly making "false claims" on the Government when they have erroneously paid Medicare claims. *Second*, in their capacity as private insurers or administrators, BCBS Plans have been sued for "false claims" where HCFA has made mistaken Medicare payments in circumstances in which federal law provides that Medicare coverage is secondary to that of private insurance. *See* 42 U.S.C. § 1395b (Medicare as Secondary Payer statute). As *qui tam* litigation in the health care industry becomes increasingly prevalent, BCBS Member Plans are likely to face a greater number of such lawsuits in the future.

Because of its nationwide scope and the private/public roles of its Member Plans, BCBSA is in a unique position to aid this Court in its understanding of the practical effect of *qui tam* litigation on the health care industry in general, and to illuminate and illustrate the specific practical consequences of the constitutional deficiencies identified by petitioners. Thus, the participation of BCBSA as *amicus curiae* will facilitate this Court's understanding of the importance of the constitutional issues raised and the need for this Court's review of those issues.

Accordingly, BCBSA respectfully requests that its motion for leave to file an *amicus curiae* brief in support of the petition for a writ of certiorari be granted.

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BRIEF OF THE BLUE CROSS AND BLUE SHIELD ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The interest of the *amicus* is set forth in the motion accompanying this brief.

SUMMARY OF THE ARGUMENT

The Blue Cross and Blue Shield Association ("BCBSA") supports and adopts petitioner's views on the

constitutional infirmities of the *qui tam* provisions of the False Claims Act. *See* Pet. at 6-23. In this *amicus curiae* brief, BCBSA demonstrates how the experiences of its Member Plans and other health insurers illustrate these constitutional deficiencies on an immediate and practical level. BCBSA further demonstrates that the unconstitutional *qui tam* provisions have already had a significant adverse impact not only upon health insurers but upon the entire health care industry. Given the expanding federal involvement in the health care field, the fact that the federal government already spends more than $130 billion annually on health care, the ambiguities in interpreting and applying many complex federal regulations concerning health care, and the growing awareness of the *qui tam* device among the legal community, it is clear that *qui tam* will in the future place an even greater burden on the health care industry and on the general public which must pay for health care. The substantial constitutional questions regarding *qui tam* therefore merit this Court's immediate review.

REASONS FOR GRANTING THE WRIT

I. THE EXPERIENCES OF BCBS MEMBER PLANS AND OTHER HEALTH INSURERS ILLUSTRATE THE CONSTITUTIONAL DEFICIENCIES OF THE *QUI TAM* PROVISIONS OF THE FALSE CLAIMS ACT

The heavily regulated health care field, which now amounts to approximately 14 percent of gross domestic

product,[1] provides ample opportunities for creative relators, unconstrained by Article III standing requirements, to allege that insurers have made "false claims" on the Government. In the past five years, for instance, a single law firm, Stinson, Lyons, Gerlin & Bustamante ("Stinson Lyons"), has filed separate *qui tam* actions against six different health insurers, including two BCBS Member Plans.[2] Each case involved similar allegations that the defendant had adopted claims-paying procedures under

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[1] The Congressional Budget Office has reported that national health expenditures totalled $751.8 billion, or 13.2 percent of gross domestic product in 1991, projecting that such expenditures will reach 17 percent of the gross domestic product by 1997. Congressional Budget Office, *Controlling the Rate of Growth of Private Health Insurance Premiums*, 1 (Sept. 1993).

[2] Five of these actions were brought by Stinson Lyons itself as relator. *See United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 736 F. Supp. 614 (D.N.J. 1990), *aff'd*, 944 F.2d 1149 (3d Cir. 1991); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Georgia, Inc.*, 755 F. Supp. 1040 (S.D. Ga. 1990); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Georgia, Inc.*, 755 F. Supp. 1055 (S.D. Ga. 1990); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Pilot Life Ins. Co.*, No. C-90-29-G (M.D.N.C. Jan. 22, 1992); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life and Accident Ins. Co.*, No. CIV-1-89-331 (E.D. Tenn. Dec. 10, 1991); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Pan American Life Ins. Co.*, No. 90-411, 1992 WL 125329 (E.D. La. May 22, 1992). In the sixth action, Stinson Lyons served as counsel for the nominal relator. *See United States ex rel. Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, No. 90-1945-CIV-HIGH-SMITH (S.D. Fla. Aug. 26, 1992), *appeal pending*, No. 92-4875 (11th Cir. argued June 2, 1993).

which it would pay claims of Medicare eligible participants on a secondary basis, even where it was obligated by federal law to pay primary to Medicare. Stinson Lyons claimed that these alleged procedures resulted in "false claims" on the Government.

The United States declined to intervene in any of the six actions. All of the actions were ultimately dismissed with prejudice and none led to a penny's worth of recovery for the Government. As one court observed in its order of dismissal, the facts proffered to substantiate the "allegedly fraudulent 'schemes' constitute, at most, bureaucratic error or mistake."[3]

Meritless lawsuits, of course, are not unique to *qui tam* litigation. *Qui tam* litigation, however, is particularly susceptible to abuse because the relator need not have suffered an injury-in-fact in order to bring suit. Thus, an uninjured relator like Stinson Lyons may seize upon an arguable bureaucratic error or mistake as evidence of fraud and then seek to vindicate its theory through widespread litigation, hoping that civil discovery will reveal that *some* defendant has injured the Government through fraudulent practices. As one court stated, "[w]hat Stinson Lyons is attempting to do here is analogous to describing the elements of a crime (vehicular manslaughter, for example) and then picking a citizen at random, and charging him with the crime."[4]

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[3] *United States ex rel. Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, No. 90-1945-CIV-HIGHSMITH at 11.

[4] *Blue Cross Blue Shield of Georgia, Inc.*, 755 F. Supp. at 1052. As former Attorney General William P. Barr has correctly observed, one of the dangers of *qui tam* is that it will "undermine the liberties of the American people" by circumventing an

The costs of defending *qui tam* actions can be substantial, even where the actions are dismissed before trial. To avoid such costs, *qui tam* defendants will often agree to settle with the relator. These settlements, however, do not necessarily provide any benefit to the United States. For example, in the Stinson Lyons *qui tam* litigation against Provident Life and Accident Insurance Company ("Provident"), the parties reached a settlement while the case was on appeal from the district court's dismissal of the action. The settlement agreement provided that Provident would pay a portion of Stinson Lyons' costs and attorneys fees, but it provided for no award of damages or penalties (and hence no financial benefit to the Government).

The United States objected to this settlement, contending that it was entitled to at least 70% of the proceeds of any recovery or settlement paid to the relator pursuant to the *qui tam* provisions of the False Claims Act. *See* 31 U.S.C. § 3730(d)(2). The court, however, overruled the objection, holding that the Government had no right to object because it had declined to intervene in the action.[5] This decision illustrates the Government's lack of control over the relator once it initially declines to intervene and demonstrates the potential for abuse where private parties with their own agendas exercise executive law

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enforcement structure "designed to protect the people from the improvident or tyrannical enforcement of the laws." *See Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. Off. Legal Counsel 249, 253 (1989).

[5] *Provident Life and Accident Ins. Co.*, No. CIV-1-89-331 at 3 (E.D. Tenn. Jun. 25, 1992).

enforcement authority.[6] Provident's decision to settle in this case also shows that a party with a strong legal defense may nonetheless settle simply to avoid the cost and uncertainty of litigating in a complex regulatory environment.

As this Court well knows, the detail and complexity of federal regulation in the Medicare, Medicaid, and other health care fields often makes it difficult to determine what conduct is or is not permitted. Therefore, it is particularly important that the Attorney General exercise discretion in deciding whether to charge a party with fraud. This power to decide whether and how to enforce the law is a core power of the executive branch, which may be exercised only by a properly appointed Government officer. *Qui tam*, however, "effectively strips this power away from the Executive and vests it in private individuals, depriving the Executive of sufficient supervision and control over the exercise of these sovereign powers."[7]

Even when the United States chooses to intervene, the relator retains a substantial ability to interfere with the exercise of executive authority.[8] The statute restricts, for instance, the Government's ability to settle or dismiss a case if the relator objects. *See* 31 U.S.C. § 3730(c). This

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[6] It is not unusual for relators to structure settlements in such a way as to avoid sharing the recovery with the Government. *See DOJ Objects to Whistleblower Settlements*, The DOJ Alert, July 1992, at 7-8.

[7] *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. Off. Legal Counsel at 252.

[8] *See generally id.* at 273.

essentially allows the relator to conduct a mini-trial on the issue of the Government's exercise of its litigative discretion.

For example, in a pending *qui tam* action against Blue Cross and Blue Shield of Florida, Inc. ("BCBSF"), the relator has objected to a settlement reached between the Government and BCBSF after eight months of arm's length negotiation.[9] The relator's objections specifically put at issue (1) the Government's analysis of both the facts and the law underlying the claim; (2) the Government's evaluation of the likely recovery versus the cost of litigation and the administrative burden it would place on the Medicare program; and (3) the Government's evaluation of the settlement's effect on public confidence in the integrity of the Medicare program.[10] Such objections attack the very heart of the Attorney General's decision-making and "raise[] the specter of disruption of the tripartite balance of government by undermining the executive branch's litigative discretion." *United States ex*

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[9] Relator's Memorandum in Opposition to United States' Motion to Approve Settlement Notwithstanding Relator's Objections in *United States ex rel. Burr v. Blue Cross and Blue Shield of Florida, Inc.*, No. 91-134-Civ-J-16 (M.D. Fla. filed Oct. 15, 1993). The *Burr* case involves allegations that BCBSF, as administrator of Part B of the Medicare program in Florida, improperly supervised the transition from one computer subcontractor to another and thus was responsible for the Government paying a higher level of erroneous claims submitted by physicians, suppliers and beneficiaries.

[10] *Id.* at 12-17.

rel. Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1093 (C.D. Cal. 1989).[11]

Furthermore, the relator sought discovery in aid of her objections to the settlement. The Government vigorously opposed such discovery, arguing that the relator should not be permitted "to force the United States to engage in costly and time-consuming satellite litigation over the settlement."[12] The Government also pointed out that the "relator's goal is to stymie the proposed settlement by attempting to invade work product immunity, attorney-client privilege, and deliberative process protection in an effort to put the United States Government on trial."[13] Nonetheless, the U.S. Magistrate granted the relator's request to take discovery, and the district court affirmed, holding that the relator was entitled to "limited discovery directed at determining the fairness, adequacy and reasonableness of the proposed settlement."[14]

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[11] As if to highlight the separation of powers concerns here, the relator in *Burr* submitted to the district court, in support of her objections to the settlement, a congressional press release and statement praising her "principled stance" in opposing the settlement. *Id.* at 17 and Ex. 9.

[12] United States' Objections to Discovery Order Dated November 9, 1993, at 5, in *Burr*, No. 91-134-Civ-J-16 (M.D. Fla. filed Nov. 30, 1993).

[13] United States' Amendment to Objections to Discovery Order Dated November 9, 1993, at 2, in *Burr*, No. 91-134-Civ-J-16 (M.D. Fla. filed Dec. 9, 1993).

[14] *See* Order of 1-4-94, at 6-7, in *Burr*, No. 91-134-Civ-J-16 (M.D. Fla. Jan. 4, 1994). *See also United States ex rel. McCoy v. California Med. Review, Inc.*, 133 F.R.D. 143, 148-49 (N.D. Cal. 1990) (holding that a relator is entitled to discovery in aid of objections to a settlement).

In short, the experiences of BCBS Member Plans and other health insurers demonstrate the practical consequences of the constitutional deficiencies identified in the petition for a writ of certiorari. These consequences include the costs of investigating and defending meritless lawsuits, the unnecessary transformation of legal disputes into "fraud" cases, wasteful satellite litigation over the relator's rights vis-a-vis the Government, and unnecessary disruption of federal programs.

II. THE CONSTITUTIONALITY OF THE *QUI TAM* PROVISIONS OF THE FALSE CLAIMS ACT IS AN ISSUE OF WIDESPREAD IMPORTANCE TO THE HEALTH CARE INDUSTRY AND TO THE GENERAL PUBLIC

The practical vices of *qui tam* litigation are amplified by its extraordinarily broad sweep in the heavily regulated health care field. *Qui tam* lawsuits have involved not only health insurers but many other providers of medical goods and services. The Inspector General of the Department of Health and Human Services ("HHS"), testifying before Congress in 1990, gave the following examples of other *qui tam* cases that had already been brought involving the health care industry:[15]

- Actions against medical manufacturers and pharmaceutical companies which allegedly

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[15] False Claims Act Implementation: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 39-40 (1990) (prepared statement of Richard P. Kusserow, Inspector General, Department of Health and Human Services).

submitted false and fraudulent statements and evidence in applications to the Food and Drug Administration.

- Cases against a Health Maintenance Organization and various physicians for allegedly billing Medicare for non-covered services.
- Allegations against a mobile medical diagnostic company for alleged false billing.
- Lawsuits involving alleged falsification of research data and misrepresentation in connection with federal biomedical research grants.
- Cases against Professional Review Organizations responsible for ensuring that inpatient hospital services provided to Medicare beneficiaries are medically necessary and of good quality.

Moreover, as the Inspector General observed, there has been a "geometric progression" in the number of such health care *qui tam* cases referred to HHS for investigation, a trend which he predicted would continue "as the general public and the legal community become increasingly aware of the *qui tam* provisions of the False Claims Act."[16] Indeed, "HHS is second only to the Department of Defense in the number [of] *qui tam* cases that have been filed."[17]

This trend is virtually certain to continue for the foreseeable future. Congress, public interest groups, and the plaintiffs' bar have all affirmatively expressed an

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[16] *Id.* at 37.

[17] *Id.*

intent to increase the use of *qui tam* litigation in the health care field.[18] Moreover, "the growth in federal disbursements for health care suggests increased *qui tam* opportunities involving reimbursement and service-delivery programs administered by the Health Care Financing Administration (Medicare and Medicaid), Veterans Affairs (veterans hospitals), Department of Defense (CHAMPUS, military hospitals), Indian Health Service (reservation clinics), Bureau of Prisons (correctional infirmaries), Office of Personnel Management (civil service health insurance), and the like."[19] One commentator suggests that future *qui tam* actions could even be brought for poor quality medical services, *i.e.*, as a type of federal malpractice claim not subject to traditional tort defenses.[20]

The constitutionality of the *qui tam* provisions of the False Claims Act is thus a matter of great importance to the entire health care industry. *Qui tam* litigation will increasingly place a financial burden on the industry and consume the scarce resources of the Department of Justice, HHS, and the Medicare program. Ultimately, the general public, which pays for health care through taxes and private payments, will bear most of these costs.

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[18] *See id.* at 84-85; Pet. at 26.

[19] David C. Hsia, *Application of Qui Tam to the Quality of Health Care*, 14 J. Legal Med. 301 (1993).

[20] *Id.* at 310. Indeed, the opportunities to employ *qui tam* in the health care field will be even more greatly multiplied if the involvement of the government in the delivery and financing of health care services is expanded to the degree contemplated by some current legislative proposals. *See, e.g.*, The Health Security Act, S.1757, 103d Cong., 1st Sess. (1993).

Proponents of *qui tam* argue that its ills are justified by the greater good of detecting and deterring fraud against the United States. This argument fails for a number of reasons. *First*, experience shows that a very high proportion of *qui tam* lawsuits are meritless. *Second*, with respect to those *qui tam* cases that the Government considers to have merit, the Government often maintains that the cases would have been brought even in the absence of *qui tam*.[21] *Third*, virtually all of the alleged benefits of *qui tam* could be achieved, without offending the Constitution, simply by providing a financial incentive for individuals with information regarding fraud to provide this information to the Government. Moreover, even if evidence showed that *qui tam* provided a net economic benefit (which it does not), this benefit would not justify the harm that *qui tam* is doing to constitutional liberties and to the tripartite structure of government. *See INS v. Chadha*, 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.").

This Court's immediate review of the constitutionality of the *qui tam* provisions of the False Claims Act would be of great benefit to the health care industry and

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[21] *See* False Claims Act Technical Amendments of 1992: Hearing on H.R. 4563 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 102d Cong., 2d Sess. 19-21 (1992) (prepared statement of Stuart M. Gerson, Assistant Attorney General, Civil Division, U.S. Department of Justice) (discussing problem of "parasitic lawsuits").

the public. In view of the fact that most *qui tam* cases are either dismissed or settled (or, as in the *Provident* case, both), it is unlikely that the constitutional issues will in the near future again be squarely presented for the Court's review as in this case. In the absence of such review, parties will continue to litigate *qui tam* cases without the benefit of the Court's guidance on the constitutional issues. Furthermore, if, as BCBSA believes, the *qui tam* provisions are in fact unconstitutional, the Court's review will prevent the unnecessary expenditure of time and money by the lower courts, the Government, and *qui tam* defendants, and will avoid embroiling Congress and the courts in the litigative decisions properly within the discretion of the executive branch.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition for a writ of certiorari, BCBSA respectfully submits that the petition should be granted.

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